UNITED OVERSEAS BANK LTD.

v.

SIN LEONG IRONBED & FURNITURE MANUFACTURING CO. PTE. LTD. & ORS.

HIGH COURT, SINGAPORE
CHAN SEK KEONG JC
[SUIT NO. 657 OF 1987]
20 JANUARY 1988

CIVIL PROCEDURE: *Costs - Appeal against refusal to award taxed costs on a solicitor and client basis - Whether Court has the discretion award taxed cost under O. 59 r. 31(4) of the Rules of the Supreme Court - Whether an agreement on taxed costs on a solicitor and client basis valid - Whether O. 59 r. 2(2) and O. 59 r. 31(4) have the effect of curtailing contractual rights.*

This is an appeal by the plaintiff against the decision of the Senior Assistant Registrar in refusing to award them taxed costs on a solicitor and client basis.

The plaintiff who are bankers commenced an action against the 1st defendant for repayment of $63,000.52 being outstanding credit facilities granted to it and against the 2nd to 6th defendants as guarantors. The plaintiff also claims costs on a solicitor and client basis as part of their claim in their pleading. The plaintiffs were given leave to enter final judgment against the defendant but were only allowed fixed costs of $700 as provided in Appendix 2 to O. 59 of the Rules of the Supreme Court.

The Senior Assistant Registrar in awarding the fixed costs stated that the Court has no discretion to award taxed costs under O. 59 r. 31(4) which sets out the power of the Court to award costs. If the Court has a discretion to award cost, he could not exercise it in the plaintiff's favour as the claim was a simple claim with no special features which would warrant taxed costs. If taxed costs is warranted, he would only order that costs be taxed on a party and party basis and not on a solicitor and client basis and that the Rules of Court have curtailed the contractual rights of the plaintiffs to the solicitor and client costs.

The plaintiff contended that the decision of the Senior Assistant Registrar based on the above grounds was wrong and thus this Appeal.

Held:

[1] Where the Court awards costs to a party the general rule is that he is entitled to taxed costs as provided for under r. 9(1). Order 59 r. 31(4) qualifies r. 9(1) to the extent in the cases prescribed in Appendix 2, a successful party is only allowed fixed costs in lieu of taxed costs 'unless the Court otherwise orders'. The expression must therefore refer to a discretion to order taxed costs and not no costs.

[2] There is no rule of law or public policy which prohibits a borrower from agreeing to pay lender the lender's costs in taking steps to recover the loan on a solicitor and client basis. He is entitled to impose an indemnity as to his costs as one of such terms and where he has done so it becomes unnecessary for him to rely on the discretionary power of the Courts to award his costs. The plaintiffs in this case are entitled to such costs in contract which they have send for as part of their claim.

[3] Neither O. 59 r. 2(2) nor r. 31(4) has the effect of curtailing the plaintiffs right in the present action to solicitor and client costs as agreed by the defendants.

[Appeal allowed.]

Cases referred to:
Mansfield v. Robinson [1982] 2 KB 353
Sim Lim Finance Ltd. v. Pelandok Enterprises Pte. Ltd. [1981] 1 MLJ 280
Exparte Fewings [1883] 25 Ch D 338
London Borough of Ealing v. El Isaac [1980] 2 All ER 549

Legislation referred to:
Rules of the Supreme Court [Sing], O. 59, rr. 2(2), (3), 9(1), 31(4)
Supreme Court of Judicature Act [Sing], s. 18(2)

For the plaintiffs - R.E. Martin
For the defendants - Wijaya

JUDGMENT

Chan Sek Keong JC:

This is an appeal by the plaintiffs against the decision of the Senior Assistant Registrar in refusing to award to them taxed costs on a solicitor and client basis.

The plaintiffs, who are bankers, commenced an action against the 1st defendant for repayment of $63,900.52 being the outstanding credit facilities granted to it and against the 2nd to 6th defendants as guarantors. The plaintiffs also claim costs on a solicitor and client basis as part of their claim in their pleading.

It is not disputed that the plaintiffs had agreed to grant banking facilities to the 1st defendant on terms as to costs of enforcement as follows:

> (5) All Costs, expenses, legal or otherwise connected with the execution, implementation and enforcement of the above Line of Credit shall be borned by your company.

It is also not disputed by the guarantors who had appeared that they had also agreed to pay the plaintiffs' costs of enforcement as follows:

> ...all costs including solicitor and client costs charges and expenses which you may incur in enforcing or seeking to obtain payment of all or any of the moneys hereby guaranteed.

The writ was served on all the defendants other than the 5th defendant. Each of them entered appearance, following which the plaintiffs applied for summary Judgment. The plaintiffs were given leave to enter final Judgment against the said defendants but were only allowed fixed costs of $700 as provided in Appendix 2 to O. 59 of the Rules of the Supreme Court.

The fixed costs were awarded on the following grounds as set out in the Grounds of Decision of the Senior Assistant Registrar:

(a) the Court has no discretion to award taxed costs under O. 59 r. 31(4) which Rules sets out the power of the Court to award costs;

(b) if the Court has a discretion to award taxed costs, he would not exercise it in the plaintiffs' favour as the claim was a simple claim with no special features which would warrant taxed costs;

(c) further, even if taxed costs were warranted, he would only order that costs be taxed on a party and party basis and not on a solicitor and client basis, bearing in mind the circumstances of this case;

(d) the Rules of Court have curtailed the contractual right of the plaintiffs to solicitor and client costs.

Before me, the plaintiffs have contended that the decision of the Senior Assistant Registrar was wrong on the following grounds:

(a) the Court has a discretion under O. 59 r. 31(4) to award taxed costs in lieu of fixed costs:

(b) the Senior Assistant Registrar's refusal to exercise his discretion in favour of the plaintiffs was wrong as the reasons given in support of it did not touch upon the conduct of the plaintiffs in connection with these proceedings;

(c) in any case, the plaintiffs were entitled by contract to solicitor and client costs and the Rules of Court cannot take away such rights; the Court therefore has no discretion in the matter.

The Senior Assistant Registrar's decision that the Court does not have any discretion to award taxed costs was based on his interpretation of the words "unless the Court otherwise orders" in O. 59 r. 31(4) read with Appendix 2 thereto.

The material portions of O. 59 r. 31 read as follows:

31-(1) Subject to the foregoing Rules and the following provisions of this Rule, the scale of costs contained in Appendix 1 to this Order, together with the notes and general provisions contained in that Appendix, shall apply to the taxation of all costs incurred in relation to contentious business done on or after the coming into force of these Rules ...

(4) Notwithstanding para. (1) costs shall, unless the Court otherwise orders, be allowed in the causes to which Appendix 2 to this Order applies in accordance with the provisions of that Appendix.

The material portions of Appendix 2 read as follows:

Fixed Costs

Part 1

Costs on Judgment Without
Trial for a Liquidated Sum

(1) The scale of costs set out in Part II of this Appendix shall apply in relation to the following cases if the writ of summons therein was issued and indorsed in accordance with O. 6, r. 2(1)(b), with a claim for a debt or liquidated demand, that is to say -

(a) cases in which the defendant pays the amount claimed within the time and in the manner required by the indorsement of the writ;

(b) cases in which the plaintiff obtains Judgment in default of appearance under O. 13, r. 1, or under that Rule by virtue of O. 79, r. 4, or Judgment in default of defence under O. 19, r. 2, or under that Rule by virtue of O. 79, r. 4;

(c) cases in which the plaintiff obtains Judgment under O. 14 either unconditionally or unless that sum is paid into Court or to the plaintiff's solicitors.

Part II

Basic Costs

Costs to be allowed in cases under the following sub-paragraphs of para. 1 of this Appendix

(a)	(b)	(c)
$250	$450	$700

The Senior Assistant Registrar interpreted the expression "unless the Court otherwise orders" as giving a discretion to the Court either to order no costs or fixed costs as provided in Appendix 2. There was no half way house. He came to this conclusion on the ground that otherwise the concept of fixed costs would be rendered meaningless.

In my view, the expression "unless the Court otherwise orders" gives the Court the discretion to order taxed costs and not to order no costs for the following reasons. Firstly, the power of the Court is derived from s. 18(2) of the Supreme Court of Judicature Act and the manner it is to exercise such power is set out in O. 59 r. 2(2) which provides as follows:

> Subject to the express provisions of any written law and of these Rules, the costs of and incidental to proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid.

The power of the Court to award or to refuse costs to a party is derived from O. 59 r. 2(2) and not O. 59 r. 31. Where the Court awards costs to a party, the general rule is that he is entitled to taxed costs. This is found in r. 9(1) which provides as follows:

> Subject to this Order, where by or under these Rules or any order or direction of the Court costs are to be paid to any person, that person shall be entitled to his taxed costs.

Therefore the words "unless the Court otherwise orders" in O. 59 r. 31(4) adds nothing to the power of the Court. To construe it as such is to give the Court an unnecessary power.

Secondly, O. 59 r. 31 deals with the scale of costs to be applied in the taxation of costs; Rule 31 does not give the Court the power to order taxed costs which power is found in r. 9(1). Rule 31(4) qualifies r. 9(1) to the extent that in the cases prescribed in Appendix 2, a successful party is only allowed fixed costs in lieu of taxed costs, "unless the Court otherwise orders". The expression must therefore refer to a discretion to order taxed costs and not no costs.

There is no rule of law or public policy which prohibits a borrower from agreeing to pay to a lender the lender's costs in taking steps to recover the loan on a solicitor and client basis. Indeed, there is no reason why a lender should put himself potentially out of pocket when making a loan on terms negotiated at arm's length. He is entitled to impose an indemnity as to his costs as one of such terms and where he has done so, it becomes unnecessary for him to rely on the discretionary power of the Courts to award him costs. The principle that parties may by agreement oust the statutory discretion of a tribunal in awarding costs was upheld in *Mansfield v. Robinson* [1982] 2 KB 353 where the parties had submitted their differences to arbitration and had agreed that the successful party should have costs on the High Court scale. The agreement was not communicated to the arbitrator who, in finding in favour of one party awarded that each party should pay its own costs. The successful party sued on the agreement for costs and the Court held that the agreement was valid and enforceable.

In the present case, the plaintiffs have sued the defendants for costs on a solicitor and client basis as part of their claim. They are entitled to such costs in contract. They are not invoking the power of the Court to award them costs in accordance with the rules of Court but in accordance with their contractual rights. There is no reason why they should not be entitled to such costs.

The Senior Assistant Registrar has also given, as one of the grounds of his decision, that Rules of Court might well have the effect of curtailing contractual rights. He relied on the decision of the learned Chief Justice in *Sim Lim Finance Ltd v. Pelandok Enterprises Pte Ltd* [1981] 1 MLJ 280 as an example of such a Rule of Court. I do not regard that decision as an authority that O. 42 r. 12 had the effect of curtailing the mortgagees' right to a rate of interest higher than the statutory rate. On the contrary, the learned Chief Justice decided that the mortgagees were still entitled to interest at the contractual rate under the mortgage. In his Judgment, his Lordship after referring to the decision of the House of Lords in *Economic Life Assurance Society v. Usborne & Ors* said (at p. 280):

> Similarly, in the present case, the plaintiffs are entitled to retain their security until they were paid the principal sum and interest at 18 per cent (the convenanted rate) but, in my Judgment, they were not entitled under the present application for leave to enter Judgment in default of appearance to interest on the Judgment debt exceeding the statutory rate of 8 per cent prescribed under O. 42 r. 12.

The issue in the Sim Lim Finance case was whether the mortgagees were entitled to enter Judgment against the mortgagors for the principal sum and interest at the contractual rate (which was higher than the statutory rate). Whether or not they were so entitled depended on whether the personal remedy on the covenant had merged in the Judgment which carried interest at the statutory rate, and this was a question of construction of the covenant. If the covenant had been construed as an independent covenant, the mortgagees would have been entitled to sue on the covenant in accordance with its terms and effect: see *Exparte Fewings* [1883] 25 Ch D 338 where by Fry LJ said at p. 355:

> ... a covenant to pay interest may be so expressed as not to merge in a Judgment for the principal; for instance, if it was a covenant to pay interest so long as any part of the principal should remain due either on the covenant or on a Judgment.

and *London Borough of Ealing v. El Isaac* [1980] 2 All E.R. 549 where Templeman LJ (as he then was) said (at p. 551):

> It appears ... that merger has a very restricted operation. It does not, as appears from the *Usborne* case which I have just cited, apply to a security. It does not apply to what is said to be an independent covenant and in most mortgages and deeds of borrowing these days care is taken to make the covenant an independent covenant. So that, in practice, the number of times on which interest ceases to run from a date of Judgment is very small. But on principle and on the authorities, it seems to me, the merger doctrine only applies to contracts and covenants.

In any case, I am of the view that neither O. 59 r. 2(2) nor r. 31(4) has the effect of curtailing the plaintiffs' right in the present action to solicitor and client costs as agreed by the defendants. As I have stated, the plaintiffs are not invoking the discretionary power of the Court to award them costs but are suing to recover costs under an agreement. Therefore O. 59 rr. 2(2) and 31(4) are not relevant to the plaintiffs's claim.

Accordingly, I allow the appeal and order that the plaintiffs do have the costs of this action to be taxed on a solicitor and client basis.

Dated this 20 January 1988.

Also found at [1988] 1 CLJ 757